

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On Its Own Motion)	
)	Docket No. 11-0711
Development and adoption of rules)	
Concerning rate case expense)	
)	

REPLY BRIEF ON EXCEPTIONS OF THE STAFF OF THE
ILLINOIS COMMERCE COMMISSION

JESSICA L. CARDONI
MICHAEL J. LANNON
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Suite C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
jcardoni@icc.illinois.gov
mlannon@icc.illinois.gov

June 13, 2013

*Counsel for Staff of the
Illinois Commerce Commission*

Table of Contents

I.	Introduction	3
A.	Procedural History	3
II.	Staff Reply to Exceptions to the ALJPO's Exclusion of Internal Rate Case Expense Recovery.....	5
III.	Reply to ComEd's New Section .500 Deferral for Recoupment	7
IV.	Staff Reply to Nicor Exception No. 1 Governing Law Regarding Standards.....	8
V.	Staff Reply to Exceptions to the Issue of Supporting Affidavits	9
VI.	Conclusion.....	9

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
)	Docket No. 11-0711
Development and adoption of rules)	
Concerning rate case expense)	
)	

**REPLY BRIEF ON EXCEPTIONS OF THE STAFF OF THE
ILLINOIS COMMERCE COMMISSION**

NOW COME the Staff witnesses of the Illinois Commerce Commission (“Staff”), by and through their undersigned counsel, pursuant to Section 200.830 of the Illinois Commerce Commission’s (“Commission”) Rules of Practice (83 Ill. Adm. Code 200.830) and the Administrative Law Judge’s May 8, 2013 Ruling, and respectfully submit this Reply Brief on Exceptions (“RBOE”) in the instant proceeding.

I. Introduction

A. Procedural History

As Staff discussed in detail in its Initial Brief (“IB”), the Final Order in Docket No. 10-0467, a Commonwealth Edison Company rate case, directed a rulemaking be initiated to examine the issue of rate case expenses and provide guidance to all parties as to what evidence is needed to establish attorney fees and expert witness fees; specifically, how to apply Section 9-229 of the Public Utilities Act (“Act” or “PUA”) in Commission rate cases. (Staff IB, p. 3) (citing Order, Docket No. 10-0467, May 24,

2011, p. 71; 220 ILCS 5/9-229) The Commission initiated this proceeding on November 2, 2011. (Initiating Order, Docket No. 11-0711, November 2, 2011, p. 2)

Although Staff filed its proposed Draft Rule (“Draft Rule”) on September 19, 2012, various parties jointly filed Initial Comments on October 31, 2012 and Verified Reply Comments were filed on November 28, 2012, on December 4, 2012 the Administrative Law Judge (“ALJ”) indicated that Initial and Reply Briefs were necessary in order to further address the body of law governing attorney’s fees and expert witness fees and other issues. (*Tr.*, December 4, 2012, pp. 41-43) The ALJ specifically requested the parties brief the following issues: the applicable case law concerning attorneys’ and expert witness fees; affidavit requirement, recovery of expenses for utility in-house employees; overhead costs, and incidental expenses.

IBs were filed on January 13, 2013 by Commonwealth Edison Company (“ComEd”), The Peoples Gas Light and Coke Company and North Shore Gas Company (“Peoples/NS”), MidAmerican Energy Company (“MEC”), Northern Illinois Gas Company d/b/a Nicor Gas (“Nicor”), Ameren Illinois Company d/b/a Ameren Illinois (“Ameren”), and Mt. Carmel Public Utility Company (“Mt. Carmel”) (jointly, the “Utilities”), the Citizens Utility Board (“CUB”) and the People of the State of Illinois (“AG”) (jointly, “AG/CUB”). RBs were filed on February 14, 2013. The ALJ issued a Proposed First Notice Order (“ALJPO”) on April 30, 2013. Staff, MEC, Ameren, Peoples/NS, ComEd, Nicor, and AG/CUB filed Briefs on Exception (“BOEs”) on June 6, 2013. This Reply to Exceptions follows. Staff also includes its edits to the ALJ’s Draft First Notice Order of the Rule as Attachment A.

II. Staff Reply to Exceptions to the ALJPO's Exclusion of Internal Rate Case Expense Recovery

Although Staff did not take exception to the ALJPO's conclusion excluding internal and affiliate rate case expense recovery, Staff now joins Peoples/NS, MEC and the AG/CUB, and request that Staff's proposed original language concerning internal utility and affiliate costs replace the ALJPO's new section 200 (D) and other relevant references in the Draft Rule. (AG/CUB BOE, p. 4; Peoples/NS BOE, pp. 9-15;¹ MEC BOE, pp. 6-7) In Staff's view, from a purely legal perspective, a consistent legal analysis requires Staff to join this exception.

Upon further review of the ALJPO, and in reviewing the BOEs of AG/CUB, Peoples/NS and MEC, Staff realizes that to be consistent with and follow its own logic it should have excepted to this conclusion in the ALJPO in the Staff BOE. Without rehashing the specific positions of the AG/CUB, Peoples/NS and MEC, Staff generally agrees with them on this position.

In a nutshell, the ALJPO's sole rational for excluding internal and affiliate expenses from Section 9-229 recovery is based upon its misinterpretation of the IAWC Appellate Order.² With that in mind, the specific language of Section 9-229 provides that the "Commission shall specifically assess the justness and reasonableness of *any amount expended by a public utility* to compensate attorneys or technical experts to prepare and litigate a general rate case filing." (220 ILCS 5/9-229) (emphasis added).

¹ Staff does not agree with Peoples Gas to the extent that in Exception 7 it does not support Staff's original position that internal costs sought to be recovered under Section 9-229 need to be documented and supported just like external rate case expenses. See Peoples Gas BOE at 18-19. Staff is unclear on the meaning of Peoples Gas Exception No. 7.

² *People ex. rel. Madigan v. Illinois Commerce Comm'n*, No. 1-10-1776, 1st Dist., December 9, 2011 ("IAWC Appellate Order").

Because of this clear language, Staff's proposed language allowed a utility, but did not require a utility, to recover rate case expense recovery if the utility could document and demonstrate the reasonableness of these expenses in the same manner as the Staff proposed rule required of utilities for external rate case recovery. As Staff explained in its IB (at 11-13), there is no requirement that the attorneys or technical experts in question be "outside" the utility's employee roster or payroll. (*Id.*)

Further, Staff also found the AG/CUB BOE particularly compelling on this issue. Specifically, Staff agrees with this response to the ALJPO's analysis:

There are several problems with this analysis. First, the Proposed Order misstates the breadth of the *Madigan* ruling in its conclusion to strike Staff's proposal to include in-house technical and legal expenses (claimed as rate case expense) within the scope of the rule. Second, by excluding these unusual and non-recurring expenses from the rate case expense category of recoverable expenses, it likely will unintentionally inflate customer rates by permitting utilities to incorporate these expenses *en masse* as normal test year operating expenses, thereby ensuring the extraordinary expense recovery in rates each year and indefinitely. Third, by requiring utilities to claim these expenses as normal operating expenses, the utilities can evade the heightened scrutiny that Section 9-229 of the Act and the *Madigan* Court require.

(AG/CUB BOE, p. 4)

Staff also agrees with MEC's analysis of the Final Order in the Charmar case (see Docket No. 11-0561Cons.), which has recognized that the IAWC Appellate Order recognizes that the *Kaiser* line of cases provide "guidance." (MEC BOE, p. 5) Section 9-229 does not prohibit a utility from recovering employee or affiliate employee expenses expended to prepare a rate case. Indeed, the entire finding of the Charmar Final Order on rate case expense was because Utilities, Inc. used its internal staff to prepare its rate cases. (Order, Docket Nos. 11-0561 Cons., May 22, 2012, p. 19)

Staff, therefore, and consistent with its IB and Commission precedent, reiterates its conclusion recommendation that neither the IAWC Appellate Order nor Section 9-229 limits experts or attorneys to those employed outside of the utility. Staff strongly urges the Commission to retain the language in Staff's Draft Rule that mandates the same requirements from in-house experts and counsel that wish to recover Section 9-229 expenses from ratepayers.

III. Reply to ComEd's New Section .500 Deferral for Recoupment

In its BOE, ComEd proposes a new section to the draft rule that provides for deferral for recoupment of rate case expenses disallowed in a previous EIMA formula rate case if an appellate court subsequently reverses that disallowance. (ComEd BOE, p. 17) Staff objects to the inclusion of the proposed new section since the subject matter is outside the scope of this rulemaking. The Initiating Order for Docket No. 11-0711 stated "that a rulemaking could provide guidance for all parties as to what evidence is needed to establish attorney fees and expert witness fees". Section 9-229 of the Public Utilities Act requires the Commission to specifically assess the justness and reasonableness of the attorney and expert witness fees in rate case expense.

The recovery of rate case expense under 220 ILCS 5/16-108.5 subsections (c) and (d) is specifically addressed in 220 ILCS 5/16-108.5(c)(4)(E). Any provisions for recovery under EIMA would be best addressed through the evidentiary process to consider the specific facts of the case rather than in this rule that would have general applicability to all utilities. Therefore, ComEd's proposed new section should be rejected in its entirety.

IV. Staff Reply to Nicor Exception No. 1 Governing Law Regarding Standards

Staff, like all other parties, agrees with Nicor that the ALJPO misinterprets the IAWC Appellate Order, which constitutes the general gist of the Nicor Exception No. 1. However, Staff is concerned that some Nicor language may imply a misrepresentation of the IAWC Appellate Order. Staff's concern may only be a matter of semantics. Nicor's exception No. 1 concludes that: "Section 9-229 requires the Commission to make an express finding regarding rate case expenses but *does not hold these expenses to a higher standard for recovery than every other utility operating expense.* (Nicor BOE, p. 5) (emphasis added). As Nicor itself notes, the *Madigan* court expressly concluded that: "Section 9-229 mandates a more detailed finding than what is generally required of the Commission, otherwise the purpose of the legislative action to enact it was unnecessary." (*People ex. rel. Madigan v. Illinois Commerce Comm'n*, No. 1-10-1776, 1st Dist., December 9, 2011 (*IAWC Appellate Order*), ¶ 47)

Staff disagrees with the notion that the standard under Section 9-229 is the same as that for any other utility operating expense, otherwise why would the legislation be necessary. Staff obviously agrees that the overall standard is just and reasonable but that "Section 9-229 mandates a more detailed finding" than for other operating expenses. If Nicor is making a distinction between "standards" and the type of evidence and review that Commission must undertake ("findings") to determine whether the standard has been met, then Staff's difference with Nicor may only be a matter of semantics. Staff, however, want to be clear that Section 9-229 distinguishes the recovery of rate case expenses from the recovery of ordinary operating expenses.

V. Staff Reply to Exceptions to the Issue of Supporting Affidavits

In light of the BOEs on this issue, Staff has rethought its position and now recommends that the Rule return to Staff's original language. MEC, Ameren and Nicor took exception to the ALJPO's conclusion on this issue. (MEC BOE, p. 10, Ameren BOE, p. 11-12, and Nicor BOE, pp. 15-17) Although Staff does not agree with these utilities' rationales, it does generally agree that an appropriate utility employee (in Staff's view, an appropriate corporate officer) should sign the affidavit.

In Staff's view, the affidavit is to verify that the *utility* found the cost of external and internal costs to be reasonable and that the utility thus has paid or will pay for these expenses. Doubtless, a senior utility officer can compare present and future costs to past costs in reviewing the invoices and make a reasonable judgment call. The point is that Staff recommends that the party paying the bills, instead of the party doing the billing, is better situated and more credible to make the appropriate judgment call than the billing party seeking the money.

VI. Conclusion

For the reasons set forth above, Staff respectfully requests that the Commission's Final Order in the instant proceeding reflect Staff's recommendations consistent with its briefs, Draft Rule, and exceptions.

Respectfully submitted,

JESSICA L. CARDONI
MICHAEL J. LANNON
Office of General Counsel

Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
jcardoni@icc.illinois.gov
mlannon@icc.illinois.gov

June 13, 2013

*Counsel for Staff of the
Illinois Commerce Commission*